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Supreme Court, U.S.
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No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS, Warden,
Nebraska State Penitentiary,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

These questions arise in the context of Nebraska statutes, under which death is a potential penalty for the crime of first degree murder, which may be committed under a felony murder theory, but in which the determination of whether the convicted individual is "death eligible" is reserved exclusively to the penalty phase of that proceeding.

1. The opinion of the Eighth Circuit Court of Appeals creates a direct and admitted conflict with the opinion of the Ninth Circuit Court of Appeals in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992) which requires resolution.

2. May a federal court require a state court, in a first degree murder case being prosecuted under a traditional felony murder theory, to ignore state substantive law and instruct its guilt phase juries on lesser homicide offenses which have never been recognized as lesser included offenses of first degree felony murder, in order to satisfy this Court's ruling in *Beck v. Alabama*?

3. Is the rule announced by the circuit court a "new rule" under *Teague v. Lane*?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in question here can be found at *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996) and in the Joint Appendix (hereinafter "JA"), 41.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on December 24, 1996.

Your petitioner's (hereinafter "Warden") motion for rehearing and suggestion for rehearing en banc was denied on February 27, 1997.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Eighth Amendment.

> Murder; person found guilty; sentence; determination. Whenever any person is found guilty of a violation of section 28-303, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of

the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification for the clerk of the court in which the finding of guilty was entered.

Neb. Rev. Stat. § 29-2520 (Reissue 1995).

After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 28-2525.

Neb. Rev. Stat. § 29-2522 (Reissue 1995).

STATEMENT OF THE CASE

The crime

The following is taken from the opinion of the Nebraska Supreme Court in the course of its mandatory direct appeal of Reeves' convictions and sentences found at *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984) (hereinafter *"Reeves I"*).

At 3:46 a.m. on March 29, 1980, Janet L. Mesner made a 911 emergency call and reported that she had been stabbed, that she thought a friend was dead from stab wounds, and that her address was 3319 South 46th Street, Lincoln, Nebraska. This address was a Religious Society of Friends meetinghouse, a place in which those of the Quaker religious faith meet. Since 1977, Janet Mesner had been a live-in caretaker of the premises. Victoria L. Lamm and her 2-year-old daughter were visitors.

Lincoln police officer Steven R. Imes responded to the call and, upon his arrival, found Janet Mesner lying on the floor in the rear of the house and attended by two or three firemen. She had seven stab wounds to her chest. When Officer Imes asked who had stabbed her, Janet replied, "Randy Reeves." The officer asked if there was anyone else still in the residence.

Janet replied, "My friend, I think she's dead, and a little girl."

Officer Imes then went upstairs and found the partially clad body of Victoria Lamm lying face up in the south bedroom. There was a fatal stab wound in her chest, which penetrated the main pulmonary artery of the heart, and a stab wound in her midline, which pierced the liver.

The disordered condition of the room in which Victoria's body was found indicated that a violent struggle had taken place. The floor was covered with blood, and several articles of women's bedclothes, a piece of luggage, and papers were strewn about the room. A lamp and sewing machine were overturned, and the telephone was ripped from its wall socket. A billfold containing identification of the defendant was found near Victoria Lamm's foot. In the middle of the blood-soaked sheets on the bed, underwear, later identified as belonging to the defendant, was found. Later examination of the underwear revealed the presence of spermatozoal secretions of the defendant's blood type. Next to the bed was one of the defendant's socks. A serrated kitchen knife with Janet Mesner's blood on it was found near the bed.

When Officer Imes was investigating the bedroom, Victoria's 2-year-old daughter walked from the north upstairs bedroom. She was unharmed.

On the main floor the police found an open window in a small room adjoining the kitchen. On the outside of the house below the open window was a garbage can turned upside down. Next to the garbage can were two shoe prints in the mud; inside the house was a shoeprint in the

downstairs den – all of which had the same characteristics as the shoes the defendant was wearing at the time of his arrest.

Janet Mesner was taken to Lincoln General Hospital in Lincoln where she was attended to by Drs. Chester Paul and Denise Capek. When Dr. Paul first saw Janet, she was in shock and emergency medical procedures were being undertaken.

Officer Richard J. Lutz, who had been dispatched to the emergency room, was present when Janet arrived. Janet told the officer that she had been "raped and stabbed" by Randy Reeves, and she gave his description. Janet did not know how Randy gained entrance to the residence, but she knew he was alone. She referred to the defendant as her cousin, and repeatedly stated, "I don't know why Randy would do such a thing to me or to my girl friend." Despite the efforts made on her behalf, Janet died at approximately 5:55 a.m.

Reeves I, 344 N.W.2d at 438-439.

Reeves subsequently was arrested and confessed to the rape and murder of Janet Mesner. *Id.*, 344 N.W.2d at 439.

State court proceedings

Reeves was charged with two counts of first degree murder under a felony murder theory. Neb. Rev. Stat. § 28-303 (1995).[1] The "predicate felony" of each of those

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[1] "A person commits murder in the first degree if he kills another person (1) purposefully and with deliberate and

charges was the first degree sexual assault of Janet Mesner. Reeves pled not guilty and not guilty by reason of insanity.

A jury convicted Reeves of both counts of first degree murder. A three-judge sentencing panel then heard the penalty phase of the trial and ultimately sentenced Reeves to death for each murder.

The Nebraska Supreme Court, although it modified the mix of aggravating and mitigating circumstances to Reeves' benefit[2] and reweighed, ultimately affirmed Reeves' convictions and sentences of death on mandatory direct appeal[3] in *Reeves I*.

Reeves next sought collateral state postconviction relief.[4] The state trial court denied postconviction relief, the Nebraska Supreme Court affirmed that denial of relief and this Court granted certiorari ordering further review in light of the Court's recent decision in *Clemons v. Mississippi*. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *cert. granted*, 498 U.S. 964 (1990) (hereinafter "*Reeves II*").

Pursuant to this Court's order, the Nebraska Supreme Court again considered Reeves' complaints in view of *Clemons* and again affirmed denial of postconviction

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premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . "

[2] In the Nebraska Supreme Court's de novo review of Reeves' sentences that court gave Reeves the benefit of an additional mitigating circumstance denied him at his trial level sentencing. *Reeves I*, 344 N.W.2d at 448.

[3] Neb. Rev. Stat. § 29-2525 and § 29-2528 (1995).

[4] Neb. Rev. Stat. § 29-3001 et seq. (1995).

relief. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied*, 506 U.S. 837 (1992) (hereinafter "*Reeves III*").

Federal habeas review

In July 1990 Reeves filed his first federal habeas corpus petition and obtained a stay of execution.

In December 1994 the United States District Court for the District of Nebraska (hereinafter "district court") first granted Reeves relief, upon a claim not at issue here.[5]

On appeal to the United States Court of Appeals for the Eighth Circuit (hereinafter "circuit court") the district court's grant of relief was reversed and the matter remanded for consideration of Reeves' remaining claims. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996).

On remand the district court again granted Reeves' relief upon yet another claim not at issue here.[6] On appeal the circuit court again reversed the district court's grant of relief. However, the circuit court concluded that Reeves' *Beck v. Alabama*, 447 U.S. 625 (1980) claim, upon which the district court had denied Reeves habeas relief, merited relief and ordered Reeves either resentenced to life imprisonment or retried. Joint Appendix (hereinafter "JA") pp. 63-64.

The Warden's motion for rehearing and suggestion for rehearing en banc was denied by the circuit court. JA 65.

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[5] *Reeves v. Hopkins*, 871 F.Supp. 1182 (D.Neb. 1994).

[6] *Reeves v. Hopkins*, 928 F.Supp. 941 (D.Neb. 1996).

SUMMARY OF THE ARGUMENT

Beck v. Alabama holds that the Eighth Amendment to the Constitution of the United States prohibits forcing a jury to choose between acquittal and death, if lesser included offenses are available under state law. This stark choice distorts the jury's determination of guilt. This distortion leads to arbitrary and capricious infliction of the death penalty. Imposition of the death penalty in this manner, without standards to guide the penalty determination, is cruel and unusual according to *Beck*.

Nebraska's death penalty law does not violate *Beck* because the jury *never* chooses between acquittal and death. The jury is required to focus on one issue – guilt or innocence of felony murder. The jury neither imposes nor recommends a sentence. Thus, the Nebraska system satisfies the concerns of the *Beck* decision to the maximum extent possible.

The Eighth Circuit's radical new rule that a jury must be instructed on lesser *non-included* offenses is without constitutional precedent. It allows the court or the defendant to choose what charges the executive branch prosecutor must file and prove. No provision of the Constitution requires that every rapist must also be charged with indecent exposure and every burglar with possession of burglary tools. This new rule will add thousands of habeas corpus cases to the federal docket as criminals seek new trials because they were not charged with some lesser offense.

In any event, this radical new constitutional rule is not applicable to Reeves because his conviction became

final in 1984, 12 years before the circuit court's announcement of this new rule.

ARGUMENT

QUESTION 1:

A CONFLICT AMONG THE CIRCUITS

I.

The question

This Court granted a writ of certiorari upon this issue:

> The opinion of the Eighth Circuit Court of Appeals creates a direct and admitted conflict with the opinion of the Ninth Circuit Court of Appeals in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992) which requires resolution.

Petition for Writ of Certiorari, #96-1693, Question 1.

II.

The conflict

The Eighth Circuit's opinion specifically acknowledges that its resolution of this case is in direct conflict with the opinion of the United States Court of Appeals for the Ninth Circuit issued in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 252 (1992). The Eighth Circuit opinion does not distinguish the facts or law of *Greenawalt* from those presented by

Reeves' claim here.[7] The Eighth Circuit's disagreement could not be more straightforward: "We cannot agree with [the *Greenawalt*] interpretation of the *Beck* doctrine." JA 54.

Since the issuance of the circuit court's opinion in *Reeves*, the Ninth Circuit has reaffirmed its determination that *Greenawalt* represents a proper application of *Beck*. "Although it may be reasonably disputed, *Reeves* does not persuade us that we erroneously resolved Greenawalt's *Beck* claim." *Greenawalt v. Stewart*, 105 F.3d 1268, 1278 (9th Cir. 1977).[8]

QUESTION 2:

OUR FEDERAL CONSTITUTION DOES NOT REQUIRE THAT CRIMINAL DEFENDANTS RECEIVE JURY INSTRUCTIONS UPON "LESSER" OFFENSES, WHERE NO "LESSER INCLUDED" OFFENSES OF THE CRIME CHARGED EXIST UNDER STATE LAW

I.

The question

This Court also granted a writ of certiorari upon this question:

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[7] The district court found the Ninth Circuit's reasoning and result in *Greenawalt* to be dispositive of this claim. "Judge Piester explicitly relied upon a Ninth Circuit case that was nearly on 'all fours' with this case." Cert. App, 18.

[8] Greenawalt was executed by the State of Arizona in January 1997, after the *Reeves* opinion was released and after Greenawalt had specifically called the conflict created by the decision in *Reeves* to this Court's attention. See *Greenawalt v. Stewart;* ___ U.S. ___, 117 S.Ct. 794, 136 L.Ed.2d 735 (1997) (denying Greenawalt's application for a stay of his execution).

> May a federal court require a state court, in a first degree murder case being prosecuted under a traditional felony murder theory, to ignore state substantive law and instruct its guilt phase juries on lesser homicide offenses which have never been recognized as lesser included offenses of first degree felony murder, in order to satisfy this Court's ruling in *Beck v. Alabama*?

Petition for Writ of Certiorari, #96-1693, Question 2.

II.

Introduction

The State of Nebraska's understanding of *Beck* is that the Eighth Amendment's ban on cruel and unusual punishment is violated when *a jury* must choose between acquittal and death. *Beck* teaches that this stark choice creates an unreliable jury decision concerning the defendant's guilt. If this understanding of *Beck* is correct, then the Eighth Circuit's decision is clearly wrong.

A.

In *Beck*, a lesser included offense existed under state law, but a special statute prohibited a jury instruction on that lesser included offense in a capital murder case. Here it has been the substantive law of the State of Nebraska for a century that second degree murder and manslaughter are not lesser included offenses of first degree felony murder.

B.

In Nebraska, the jury has no role in sentencing. The jury determines whether the defendant is guilty or not guilty of the crime charged. The court, in a separate proceeding, then determines whether the appropriate sentence is life in prison or death. A Nebraska jury is *never* faced with a decision of acquittal or death.

C.

The circuit court's grant of relief to Reeves is *not* based upon the concept of lesser "included" offenses at all, for it is clear that under Nebraska substantive law there exist no lesser included homicide offenses of first degree murder charged under a felony murder theory. Instead, the circuit court ordered relief upon a totally new and distinct premise: That Reeves has a federal constitutional entitlement to jury instructions upon crimes which are *not* lesser included offenses of the crime charged, but crimes which merely merit "lesser" punishments under Nebraska law.[9]

That theory, if not rejected here, will have a significant and disruptive impact upon the process by which criminal trials are conducted in the country.

D.

The opinion below demonstrates the need for this Court to clarify that *Beck* and its progeny are based on the

[9] "State law . . . may not prohibit an instruction on a noncapital charge . . . " JA 59.

unique concerns of the Eighth Amendment in cases in which death is a potential punishment, not the Due Process Clause.

III.

***Beck v. Alabama* has been limited to its "unique" facts**

Nebraska does not ask that *Beck v. Alabama*, 447 U.S. 625 (1980) be overruled. However, the ruling of *Beck* has been and should continue to be limited to its facts which the Court characterized as utterly "unique".[10] Each of the Court's cases which have followed *Beck*, have described situations to which the ruling in *Beck* does not apply. *Hopper v. Evans*, 456 U.S. 605 (1982) (*Beck* does not apply where the record will not support a lesser included offense instruction); *Spaziano v. Florida*, 468 U.S. 447 (1984) (*Beck* has no application where the statute of limitations had run on the lesser included offense); *Schad v. Arizona*, 501 U.S. 624 (1991) (*Beck* has no application where a lesser included offense existed under state law and an instruction was given upon it). This case should hold that *Beck* does not apply where no lesser included homicide offense exists under state law, the jury plays no role in sentencing, and a life sentence without parole is an option for the sentencing judge.

[10] *Beck*, at 635.

IV.

The holding in *Beck* is only applicable when lesser included offenses of the crime charged are recognized under state law

Beck and this Court's decisions which rely upon it, *Hopper v. Evans*, 456 U.S. 605 (1982), *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Schad v. Arizona*, 501 U.S. 624 (1991), *all* analyze this constitutional claim within the context of the well understood criminal law concept of "lesser included offenses". They do not go beyond it.

The pivotal fact in *Beck* was that a lesser included offense of the crime charge was recognized by state substantive law, but a state statute specifically prohibited its use solely in capital cases.[11]

Thus, the test employed by *Beck* in determining whether a lesser included offense instruction must be given should be pivotal to our analysis here.

A.

The *Beck* test

Beck employed a two-step analysis to determine if a lesser included offense instruction should be given: (1) Is the crime upon which instruction is requested recognized by state law as a lesser included offense of the crime charged? (2) If so, would the evidence at trial support a

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[11] *Beck* at 628.

theory that the defendant was not guilty of the crime charged but guilty of a lesser included offense?[12]

B.

Nebraska substantive law does not recognize second degree murder or manslaughter as lesser included offenses of the crime of first degree felony murder

The first step of *Beck*'s lesser included offense analysis requires a determination of existing state substantive law: Are the crimes upon which instructions are requested lesser included offenses of the crime charged?

The Nebraska Supreme Court has for 100 years consistently held that second degree murder and manslaughter are *not* lesser included offenses of the crime of first degree murder committed under a felony murder theory. *E.g., Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340, 346 (1997).

The state trial court denied and the Nebraska Supreme Court affirmed the refusal to give Reeves' jury requested instructions on second degree murder and manslaughter specifically because second degree murder and manslaughter had, for a century, been specifically recognized as *not* being lesser included offenses of first degree felony murder. *Reeves I*, 344 N.W.2d at 442. Those offenses do not "exist" as lesser included offenses under Nebraska substantive law. Thus, Reeves' request fails at the first step of the *Beck* test.

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[12] *Beck* at 635-637. To the same effect, *State v. Heubner*, 245 Neb. 341, 513 N.W.2d 284 (1994).

Without explanation, the circuit court did not engage in this crucial first step of the *Beck* opinion's lesser included offense analysis.

C.

Spaziano instructs that there is no constitutional entitlement to instructions upon nonexistent lesser included offenses of the crime charged

1.

In *Spaziano* the Court faced a situation very similar to that before us here but arrived at a result quite different from that reached by the circuit court. In *Spaziano* the Court stated:

> Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result.

Id., 468 U.S. at 455. This is the same conclusion reached by the Ninth Circuit in *Greenawalt*.[13]

2.

In *Spaziano*, lesser included offenses were recognized under state law, but their prosecution was barred by the applicable statute of limitations at the time of trial. Under that circumstance did our federal constitution prevent Spaziano's jury from considering his guilt solely of the crime of felony murder? It did not. Did that fact prevent

[13] *Greenawalt*, 943 F.2d at 1029.

the ultimate imposition of a sentence of death? It did not. This case merits the same result reached in *Spaziano*.

3.

The evil observed by the Court in the Alabama trial scheme at issue in *Beck* was a statute that prohibited the consideration of a lesser included offense, otherwise recognized by state law, *only* when the crime charged was capital.[14]

In stark contrast to the situation in *Beck*, here no Nebraska legislation denied Reeves an instruction upon an otherwise recognized lesser included offense. Instead, the instruction Reeves requested was refused because under a century of Nebraska law, the offenses upon which Reeves requested an instruction were not lesser included offenses of the crime with which he was charged.

4.

The circuit court's opinion attempts to analogize a century of Nebraska Supreme Court holdings that second degree murder and manslaughter are not lesser included offenses of felony murder with the affirmative legislative prohibition of instructions upon an otherwise recognized lesser included offense in *Beck*.[15] However, if the circuit court's analysis is correct, then the same constitutional

[14] However, that crime was not second degree murder or manslaughter, but non-capital felony murder. *Beck* at 628.

[15] JA 57, fn. 11.

concern would have been observed with respect to the state statute of limitations which had run in *Spaziano*, but it was not.

The Court's holding in *Spaziano* provides a clear message: If no lesser included offenses exist at the time of trial, our federal constitution does not require that instructions be given upon non-existent or unavailable lesser included offenses nor does it prevent the eventual imposition of a sentence of death for the crime charged. As another circuit court has observed:

> We do not read *Beck* or any other case as establishing a constitutional requirement that states create a noncapital murder offense for every set of facts under which a murder may be committed.

Hatch v. Oklahoma, 58 F.3d 1447, 1454 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1881 (1996).

In the *Beck* opinion itself the Court cited with approval *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979) in which a capital sentence was affirmed in the face of a complaint that a lesser homicide instruction should have been given. *Id.*, 447 U.S. at 636, n.12.

D.

The federal courts are not free to re-write state substantive law

It is clear from the circuit court's opinion that an attempt has been made to alter the substantive law of the State of Nebraska. Either the circuit court has ignored the substantive law of Nebraska on the subject of available

lesser included offenses, or it has re-written Nebraska substantive law and created a class of lesser but not included offenses upon which jury instructions are now constitutionally required.

It is an unconstitutional exercise of the federal judicial power for a circuit court to ignore or re-write the substantive law of any state. For a federal court to take a dispositive position on a question of state law contrary to the highest court of that state would be a significant affront to concepts of comity and federalism. *Johnson v. Fankell*, 520 U.S. ___, 117 S.Ct. 1800, 138 L.Ed.2d 108, 115 (1997), citing *New York v. Ferber*, 458 U.S. 747 (1982).

E.

The second element of the *Beck* test is not met by Reeves

Although failure to meet the first step of the *Beck* lesser included offense analysis is dispositive of the question, we note that Reeves also fails to meet the second element of the *Beck* analysis: Would the evidence at trial have supported guilt of the lesser included offense but acquittal of the crime charged?

Although the Nebraska Supreme Court appropriately resolved Reeves' request for lesser included offense instructions at the first step of the *Beck* analysis, the Nebraska trial court rejected Reeves request for lesser included offense instructions upon the second ground as well.[16]

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[16] JA 3.

Reeves' *sole* defense at trial was that his level of voluntary intoxication was such that he did not have the capacity to understand what he was doing or to understand the nature or quality of his acts. *Reeves I*, 344 N.W.2d at 440.

Thus, if Reeves' jury had accepted his theory of the case and found him to be not responsible of first degree felony murder by reason of insanity, that same finding would have exonerated Reeves of responsibility for any criminal acts, including second degree murder and manslaughter. JA 21. Reeves' only theory of the case would have prevented his being found guilty of *any* criminal offense.

Therefore, Reeves' case fails to satisfy either aspect of the *Beck* tests for when the giving of lesser included offense instructions is appropriate. The *record* would not have supported the giving of a lesser included offense instruction even if lesser included offenses had existed under Nebraska law. This court has already faced that scenario and denied relief in *Hopper v. Evans* at 613.

V.

The role of a Nebraska jury is utterly distinct from the unique role imposed upon the Alabama jury in *Beck*

At the outset we note that *Beck* is the only case in which this court perceived the problem it there remedied. *Beck* addressed an Alabama trial and sentencing scheme both unique to American law[17] and remarkably distinct

[17] *Beck*, at 635.

from the Arizona and Nebraska systems at issue in *Greenawalt* and here. The Nebraska and Arizona processes for determining the guilt of, and the appropriate punishment for, a first degree murder are so fundamentally different from the Alabama statutes at issue in *Beck* that *Beck* simply does not dictate a grant of relief in this case.

Beck is, first and foremost, about the choices and responsibilities imposed upon juries by state law. The State of Nebraska simply does not place upon its juries responsibilities even remotely analogous to those demanded of the jury in *Beck*.

A.

The Nebraska crime of first degree murder

The Nebraska Legislature has (1) defined no crime as "capital murder", (2) defined no crime for which, at the conclusion of the guilt phase proceeding, a guilty prisoner may accurately be deemed "death eligible", and (3) defined no crime for which a jury, having found the defendant guilty, is mandated to impose a sentence of death.

Neb. Rev. Stat. § 28-303 (Reissue 1995) defines the crime of first degree murder, and establishes its potential range of punishment, as follows:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by

> administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

A Class I felony is punishable by death. A Class IA felony is punishable by life imprisonment without possibility of parole.[18] Neb. Rev. Stat. § 28-105 (Reissue 1995).

As required by § 28-303, the determination of the appropriate punishment for a prisoner found guilty of first degree murder is taken up *exclusively* in a distinct, post-guilt phase of a Nebraska first degree murder trial. Neb. Rev. Stat. § 29-2521 and § 29-2522 (Reissue 1995).

Furthermore, the determination of an appropriate punishment is an exclusively judicial function. Neb. Rev. Stat. § 29-2520 (Reissue 1995).

B.

The role of Nebraska juries in first degree murder cases

The role of a jury in any Nebraska criminal case is limited exclusively to determining whether the defendant has been proven guilty beyond a reasonable doubt of the

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[18] Before a Nebraska prisoner sentenced to life for first degree murder may become parole eligible, his original life sentence must be commuted by the State of Nebraska Board of Pardons to a term of years.

crime charged. Nebraska juries are never placed in a *Beck*-like, death-or-acquit situation for two distinct reasons.

1.

First, Nebraska law never burdens its juries with any responsibility for the determination of the appropriate punishment for any crime. Neb. Rev. Stat. § 29-2261 (1995); Neb. Rev. Stat. § 29-2522 (1995).

Reeves' jury was twice instructed upon that fact. At Reeves' trial both the venire from which Reeves' jury was chosen and the jury actually seated to determine whether the State had proven Reeves' guilt beyond a reasonable doubt were accurately instructed as follows:

> You have nothing whatsoever to do with the punishment or disposition of the defendant in the event of his conviction or acquittal by reason of insanity. Therefore, in determining his guilt or innocence, you have no right to take into consideration what punishment or disposition he may or may not receive in the event of his conviction or in the event of his acquittal by reason of insanity.

JA 2 and 24.

Thus, *Beck*'s concern with the pressures placed upon Alabama jurors by that state's "death or acquit" trial and sentencing scheme, and the potential distortion of the guilt phase factfinding process which could result from it, are simply not legitimate concerns with respect to the Nebraska statutory process at issue here.

2.

Second, when a Nebraska jury finds a defendant guilty of first degree murder, that guilt phase determination is *never* dispositive, advisory or even afforded weight in the subsequent penalty phase process by which the appropriate penalty for that crime is judicially selected. Neb. Rev. Stat. § 29-2523 (Reissue 1995).

Thus, the *Beck* opinion's recognition that the potential distortion of the factfinding process created by the unique Alabama system might well not be corrected by subsequent judicial action,[19] again is not presented by Nebraska's distinct, two-step, guilt and punishment process.

C.

The circuit court significantly misapprehended the statutory roles of both Reeves' jury and the Alabama jury in *Beck* and thus failed to distinguish between them

The circuit court's grant of habeas relief to Reeves is based upon several significant misconceptions of both the situation in which Beck's jury found itself, and the distinct reality of a Nebraska jury's role in the guilt and penalty phase process of a first degree murder prosecution.

1.

The circuit court apparently concluded either that Beck's jury was aware of the fact that their mandatory

[19] *Beck* at 645.

death verdict was not the final word upon the fate of the defendant, or that Alabama law, rather than the Beck jury's *understanding* of Alabama law, prompted the result in *Beck*.[20] Neither conclusion is accurate.

First, Alabama juries were specifically *not* informed that the state trial court had the authority, under Alabama statutes, to override their mandatory verdict of death.

> The jury is not told that the judge is the final sentencing authority. Rather, the jury is instructed that it must impose the death sentence if it found the defendant guilty and is led to believe, by implication, that its sentence will be final.

Beck, at 639, fn. 15.

> [Alabama] jurors were instructed to impose the death sentence if they concluded that the defendant was guilty, and *they were not told that the trial judge could reduce the sentence to a sentence of life imprisonment.*

Hopper v. Evans, 456 U.S. at 608 (1982) (emphasis added).

Second, it was the realities *as understood by Beck's jury* at the time they undertook their factfinding responsibilities that was the Court's sole concern in *Beck*.

> In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, *diverting*

[20] JA 60-61, fn. 13.

> *the jury's attention* from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty . . .

Beck, at 642 (emphasis added).

Therefore, from the all important standpoint of Beck's jury, they reasonably understood themselves to be, in fact, confronted with the acquit-or-vote-death situation the Court found unacceptable. Contrary to the circuit court's conclusion, Reeves' jury was never placed in that situation nor given the impression that they had such a role in Reeves' trial. Reeves' jury was specifically instructed to the contrary.[21]

2.

The circuit court also bases its result upon its conclusion that *Beck* cannot be distinguished from Nebraska law because neither case involved crimes requiring a mandatory sentence of death.[22]

Contrary to the circuit court's conclusion, the Court in *Beck* noted that, from the all important standpoint of Beck's jury, the unique Alabama statutory scheme maintained or resurrected a form of mandatory death penalty which the Court had already found constitutionally infirm.

> The Alabama statute, which was enacted after Furman but before Woodson, has many of the same flaws that made the North Carolina statute

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[21] JA 2 and 24.

[22] JA 60-61, fn. 13.

> unconstitutional. Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision.

Beck, at 640.

3.

The circuit court also based its grant of habeas relief to Reeves upon the conclusion that the mandatory sentence of death required by the statutory scheme in *Beck* could not be distinguished from Nebraska's guilt and penalty phase process.[23]

Contrary to the circuit court's conclusion, the Court in *Beck* specifically recognized that the jury's mandatory verdict of death was routinely dispositive of the defendant's fate.

> [I]t is fair to infer that the jury verdict [regarding punishment] will ordinarily be followed by the judge **even though** he must hold a separate hearing in aggravation and mitigation before he imposes sentence.

Beck at 645 (emphasis added).

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[23] JA 60-61, fn. 13.

Under Nebraska law, not only is the jury given no role in the determination of a guilty defendant's punishment, but the considerations relevant to the determination of an appropriate penalty for a first degree murder are wholly independent of the considerations weighed in the jury's determination of guilt. See Neb. Rev. Stat. § 29-2522 and § 29-2523 (Reissue 1995).

4.

The circuit court also saw similarities between the Alabama sentencing process at issue in *Beck* and Nebraska's guilt and penalty phase process on the question of "death eligibility". See *Tuilaepa v. California*, 512 U.S. 967, 972-975 (1994).

> This case is like *Beck*: [The Nebraska] jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him.

Reeves v. Hopkins, 102 F.3d 977, 985, fn. 13. JA 60-61

a.

First, we agree that Reeves' jury had no "control" over the selection of his appropriate penalty under Nebraska law. However, that is not because Reeves' jury was commanded to return a mandatory sentence of death, but because Reeves' jury had no role whatsoever in the determination of Reeves' penalty. The distinction between the two situations could not be greater.

b.

Second, as we have previously noted, under Nebraska law an individual found guilty of first degree murder is not rendered "death eligible" merely by that determination. Much remains to be considered. Before a guilty first degree murderer in Nebraska becomes "death eligible", the State must, during a separate penalty phase proceeding, (1) prove beyond a reasonable doubt the existence of one or more statutory aggravating factors,[24] *and* (2) convince the sentencing court the weight afforded those factors, standing alone, "justif[ies] imposition of a sentence of death." Neb. Rev. Stat. § 25-2523 (Reissue 1995).

VI.

The circuit court opinion dramatically widens the application of *Beck* by expanding the holding of *Beck* from "lesser included offenses" to offenses which merely merit "lesser" punishment

While *Beck* turns upon the concept of "lesser included offenses", the circuit court's order of federal habeas relief does not. In this respect the circuit court opinion makes a radical departure from the logic of *Beck* and the cases which have followed it at a very crucial juncture of the analysis.

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[24] Neb. Rev. Stat. § 29-2523 (Reissue 1995).

A.

The new concept

The circuit court's grant of relief to Reeves is *not* based upon the concept of lesser "included" offenses at all. Instead, the circuit court ordered relief upon a totally new and distinct premise: That Reeves has a federal constitutional entitlement to jury instructions upon crimes which are *not* "lesser included offenses" of the crime charged, but crimes which merely merit "lesser" punishments under Nebraska law.[25] That action presents significant constitutional implications far beyond those reasonably anticipated by *Beck*.

Because the definition of what constitutes a "lesser included offense" is common to both federal and Nebraska law,[26] and because the concept of "lesser included offenses" is a universally employed concept of American criminal law,[27] caution must be employed before expanding the constitutional significance of that concept beyond *Beck*, or attaching constitutional significance to the geometrically broader concept of crimes

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[25] "State law . . . may not prohibit an instruction on a noncapital charge . . . " JA 59.

[26] See *Schmuck v. U.S.*, 489 U.S. 705 (1989) and *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605, 608 (1984); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220, 228 (1995).

[27] In *Beck* the Court noted "the nearly universal acceptance [of the availability of lesser include offenses] in both state and federal courts . . . " *Id.*, at 637. See also Shellenberger and Strazzella, "The Lesser Included Offense Doctrine and The Constitution: The Development of Due Process and Double Jeopardy Remedies", *Marquette Law Review*, Vol. 79, Fall 1995, fn. 2.

which merely merit lesser punishments. Yet the latter course is the one adopted by the circuit court without explanation.

B.

The disruption

The concept urged by the circuit court would fundamentally disrupt the orderly trial and logical resolution of most criminal proceedings in this country.

Under our American system of criminal justice it is the State, not the defendant, which selects the crime to be charged and thus the elements which the State assumes the burden to prove.

> At common law the jury was permitted to find the defendant guilty of any lesser offense *necessarily included in the offense charged*. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element *of the crime charged*.

Beck at 633 (emphasis added).

We are aware of no authority permitting a criminal defendant to place upon the State the burden of proving crimes, or the elements of crimes, distinct from the elements of the crime the State has selected to prosecute. Yet that is *exactly* the result of the circuit court's opinion.

Admittedly second degree murder and manslaughter are offenses which under Nebraska law merit "lesser" punishment than does first degree felony murder, but they are not lesser "included" offenses of the crime with

which Reeves was charged.[28] Trespassing, breaking and entering, and indecent exposure are all offenses arguably committed by Reeves in the course of the events at issue here, but those were not the offenses the State of Nebraska elected to prosecute.

Under *Schmuck v. U.S.* the appropriate query is: Are *all* of the elements of the lesser crime upon which the defendant desires instructions *included* among the elements of the greater crime the State has elected to prosecute? If they are, then the State's burden is not increased by the giving of the lesser included offense instructions.

However, if our constitution requires that merely "lesser" offenses be instructed upon, then crimes for which the State has assumed no burden of proof and elements which are *not* elements of the crime charged are, for the first time, placed at issue *after* the close of all evidence. This practice would lead to the same type of

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[28] There did exist a "lesser included offense" of the crimes with which Reeves was charged. The offense of first degree sexual assault was clearly a lesser included offense of the crimes with which Reeves was charged, it was the predicate felony upon which the felony murder charges were based. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 159, 178 (1997). Yet Reeves *did not ask* for instructions upon the only lesser included offense recognized by Nebraska law. Instead, Reeves' request a lesser included offense instruction upon crimes which, for a century, had been recognized as *not* being a lesser included offense of the crime charged. Reeves' strategic choice in that regard denied Reeves the opportunity to have his jury instructed upon an available lesser included offense – a "third option" – meriting punishment less severe than the range of punishment established for the first degree murder with which he was charged. See *Schad v. Arizona*, 501 U.S. 624, 647-648 (1991).

illogical trial and jury deliberation process rejected by the Court in *Spaziano*. Attaching constitutional significance to that concept would geometrically exacerbate the problem.

Neither *Beck* nor *Hopper* nor *Spaziano* nor *Schad* command, discuss or even consider this unique concept of criminal law.

VII.

The constitutional basis for the holding in *Beck* should be clarified

A.

Beck is an Eighth Amendment case

One of the unanswered questions regarding the holding in *Beck* and its application through *Hopper, Spaziano* and *Schad* is whether those cases are founded upon the requirement for uniquely stringent factfinding in capital cases under the Eighth Amendment or whether the result is based upon the Due Process Clause.[29]

Beck states that "we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process". *Beck* at 637. We observe in *Hopper, Spaziano* and *Schad* no articulated deviation from that statement.

We believe the result in *Beck* was prompted by Alabama's unique statutory scheme which inextricably linked the guilt and penalty decisions and required a jury to choose between acquittal and death. In that respect,

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[29] See Shellenberger and Strazzella, pages 39-114.

Beck can accurately be viewed as a mopping up exercise to bring Alabama law into accord with the Court's prior ruling in *Woodson v. North Carolina*, 428 U.S. 280 (1976). "[The Alabama statutory scheme] has many of the same flaws that made the North Carolina statute unconstitutional."[30]

Because Beck's jury perceived that a death penalty was mandatory[31] upon finding the defendant guilty of the crime charged

> the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, *without giving the jury any standards to guide its discretion.*

Beck at 640.

Thus, it would appear that only in the unique circumstance where the guilt determination mandates the imposition of a death sentence, does the denial of an instruction upon an otherwise available lesser included offense take on constitutional import. This would explain the fact that this Court has never applied *Beck* beyond cases involving its unique, Eighth Amendment capital jurisprudence. The implications of basing *Beck* on other than Eighth Amendment concerns are significant and the circuit courts appear to be split upon that issue.[32]

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[30] *Beck* at 640.

[31] *Beck* at 641.

[32] See cases collected at Shellenberger and Strazzella, pages 63-69.

B.

The ramifications of characterizing *Beck* as a holding based upon the Due Process Clause

The principal problem presented by not resolving the confusion that the result in *Beck* is based upon solely Eighth Amendment concerns, is that if the result in *Beck* is announced to be founded upon the Due Process Clause rather than the Eighth Amendment, then its application cannot logically be restrained within the context of "capital cases", and the States' lesser included offense practice will have been federalized. That act requires serious forethought.

1.

The States, while generally uniform in their use of the concept of lesser included offenses are not at all uniform in the process by which lesser included offenses are defined. At least three distinct methodologies are employed.[33] If our federal constitution is extended to this question, what are the constitutional implications of these varying practices?

Pragmatically, the potential constitutionalization of this widespread state criminal law procedure will dramatically increase the number of cases and number of claims subject to federal review under 42 U.S.C. § 2254.

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[33] Shellenberger and Strazzella, pp. 7-13.

2.

Those are some of the concerns raised if federal constitutional protection were extended, *but limited to*, the States' lesser included offense practice. But that is not what the circuit court opinion purports to do. It goes much farther.

The circuit court opinion extends the protection of our federal constitution well beyond lesser "included" offenses, to *all* offenses which merely merit lesser punishment. The problems which flow from that extension are geometrically more complicated.

As opposed to lesser included offense practice, with which the state and federal courts have experience, the circuit court opinion casts both the state and federal courts into wholly uncharted waters. How will the state and federal courts define merely "lesser" offenses? In almost every crime scenario imaginable there are many "lesser" crimes committed by the defendant in the course of achieving the theft or rape or robbery or murder which the state has elected to prosecute. Do all of those crimes now not only come into play at trial, but take on constitutional import as well? The disruption to the orderly progress of proof at trial and the confusion injected into the jury's guilt determination process would make the concerns for the rationality of our criminal justice system voiced by the Court in *Spaziano* appear trivial.[34]

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[34] *Spaziano*, at 456.

QUESTION 3:

THE RULING OF THE CIRCUIT COURT REPRESENTS A "NEW RULE" UNDER *TEAGUE V. LANE*

I.

The question

This Court also granted a writ of certiorari upon this question:

> Is the rule announced by the circuit court a "new rule" under *Teague v. Lane*?

Petition for Writ of Certiorari, #96-1693, Question 4.

A.

Teague v. Lane

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court announced, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310.

In *Lambrix v. Singletary*, ___ U.S. ___, 117 S.Ct. 1517, 1524, 137 L.Ed.2d 771 (1997) this Court described the three-step process by which a *Teague* analysis must be undertaken. First, one must determine the date upon which the habeas petitioner's conviction became final. Second, one must survey the legal landscape and determine whether a state court, considering the petitioner's claim at the time his conviction became final, would have felt *compelled* by existing precedent to conclude that the rule the prisoner now seeks the benefit of was required by the Constitution. Finally, if one determines by this

process that the prisoner seeks the benefit of a "new rule", one must then consider whether the relief sought falls within one of two narrow exceptions.

> [*Teague*] asks whether [the rule in question] was *dictated* by precedent – i.e., whether *no other* interpretation was reasonable. We think it plain from the above that a jurist considering all the relevant material (and not, like the dissent, considering only the material that favors [the result urged]) could reasonably have reached a conclusion contrary to our holding in that case. Indeed, both before and after Lambrix's conviction became final, every court decision we are aware of did so.

Lambrix, 117 S.Ct. at 1530.

Also last term this Court described the *Teague* standard as follows:

> [W]e will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.

O'Dell v. Netherland, ___ U.S. ___, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351 (1997).

II.

The analysis

A.

The date Reeves' sentences became final

Pursuant to Nebraska law,[35] Reeves was afforded a mandatory direct appeal of his convictions and sentences of death. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied*, 469 U.S. 1028 (1984).

That judgment became final with this Court's denial of Reeves' petition seeking a writ of certiorari on November 13, 1984. *Reeves v. Nebraska*, 469 U.S. 1028 (1984).

B.

The legal landscape

1. In Nebraska

Although *Beck* was decided by this Court in 1980, no discussion of *Beck* is found in Nebraska jurisprudence until the Nebraska Supreme Court's decision in *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).[36]

In *Masters* the Nebraska Supreme Court held:

> Masters cites *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), as authority for the proposition that

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[35] Neb. Rev. Stat. § 29-2525 (1995).

[36] Reeves argued *Beck* to the Nebraska Supreme Court in the context of Reeves' lesser included offense claim both on his mandatory direct appeal and in his appeal from the denial of relief upon state collateral review.

lesser-included offenses to felony murder must be considered by the finder of fact. Both of these cases are distinguishable on their facts.

* * *

In the present case, the finder of fact was not presented with the "death-penalty-or-acquit" situation in *Beck*. To the contrary, under Nebraska law the issue of guilt or innocence is determined separately from the issue of sentencing. See Neb. Rev. Stat. § 29-2520 (Reissue 1989). . . . Thus, the risk which the Court found intolerable in *Beck* is simply not present in Masters' case.

* * *

> We find that Masters was not entitled to a lesser-included offense instruction under either *Beck* or *Schad*, there being no lesser-included offenses to felony murder under Nebraska law.

524 N.W.2d at 348-349.

Thus, the rule announced by the circuit court in 1996, that our federal constitution requires the giving of instructions upon lesser homicide offenses in all first degree murder prosecutions, regardless of whether there existed lesser *included* offenses of the crime charged under substantive state law, was not a part of the Nebraska legal landscape in 1984 when Reeves' judgments became final.

2. The national landscape

a.

The Eighth Circuit cites us to no authority of this Court which "dictates" the result that the panel reached in this case. The Eighth Circuit's acknowledgment of its diametric split with the Ninth Circuit on this question belies any argument that the Eighth Circuit's result was "compelled" by *Beck*.

Beyond that, there are several other aspects of the Eighth Circuit's opinion which render the panel's decision a "new" rule under *Teague*.

First, the Eighth Circuit's only citation of authority in support of its interpretation of *Beck* is to *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir. 1982). Yet *Cordova*, consistent with *Beck* and *Hopper* and this Court's subsequent opinion in *Spaziano*, speaks only in terms of the constitutional necessity of instructions upon "lesser *included* noncapital offenses"[37] (emphasis added) supported by the evidence. *Cordova* never adopts the remarkably broader concept of a right to instructions upon *any* "noncapital charge". That concept was first announced by the Eighth Circuit in 1996.

Second, even if *Cordova* had supported the Eighth Circuit's subsequent reading of *Beck*, certainly a decision of the Fifth Circuit would not have "dictated" that the Nebraska Supreme Court reach the same conclusion in 1984.

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[37] 838 F.2d at 767.

Third, the circuit court apparently deemed it necessary to explain in some detail why prior authority in that circuit was not at odds with the rule they announced in the opinion below. JA 55, fn. 10. That effort further demonstrates that the result in *Reeves v. Hopkins* was not a foregone conclusion even within the Eighth Circuit in 1996.

b.

Certainly, the diametric conclusion previously reached and subsequently reaffirmed by the Ninth Circuit in the *Greenawalt* cases amply demonstrates that other interpretations of *Beck* are "reasonably possible". As the Ninth Circuit observed: "Although it may be reasonably disputed, *Reeves* does not persuade us that we erroneously resolved Greenawalt's *Beck* claim." *Greenawalt v. Stewart*, 105 F.3d 1268, 1278 (9th Cir. 1977).

c.

Thus, in addition to the Ninth Circuit, a Nebraska trial court judge, ten judges of the Nebraska Supreme Court,[38] a federal magistrate judge, and a federal district court judge all considered Reeves' *Beck* claim and did not feel "compelled" by the prior rulings of this Court to grant Reeves relief. These jurists not only did not find the result urged by Reeves to be "dictated", they found it to be without merit.

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[38] Krivosha, McCown and Shanahan on *Reeves I*; Boslaugh, White, Hastings, and Caporale on both *Reeves I* and *Masters*; and Fahrnbruch, Lanphier and Wright on *Masters*.

3. A "new" rule

There seems to be no basis for legitimate dispute that the rule first announced by the Eighth Circuit in the opinion below, right or wrong, represents a "new" rule under *Teague*.

C.

The *Teague* exceptions do not apply

1.

The rule announced by the circuit court opinion does not place "a class of private conduct beyond the power of the State to proscribe".[39]

The Eighth Circuit stated: "There is nothing necessarily unconstitutional with the State's definition of the mental culpability required for a felony murder conviction." JA 58.

2.

The second exception is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[40]

As we have noted above, the facts which drove the reasoning and result in *Beck* simply are not present in the procedures by which the State of Nebraska determines a criminal defendant's guilt and appropriate punishment. First and foremost, under the Alabama system at issue in

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[39] *Lambrix*, 117 S.Ct. at 1530-1531.

[40] *Lambrix*, 117 S.Ct at 1531.

Beck, the questions of guilt and punishment were inextricably linked. Under Nebraska law those two questions are answered independently, in two distinct proceedings, by two distinct entities.

Reeves' jury had only one question before it: Had the State proven Reeves' guilt of the murders charged beyond a reasonable doubt? Reeves' jury received specific instructions emphasizing their lack of involvement in the determination of Reeves' possible punishment and their responsibility solely to answer the question of Reeves' possible guilt.[41] The question of guilt having been answered, Reeves' jury was not forced to also impose a sentence of death, as did Beck's jury. Instead, Reeves' jury was *dismissed*.

Thus, while the Court's reasoning in *Beck* was couched in terms of a concern for the impact the unique Alabama capital sentencing scheme might have upon the "reliability of the guilty determination" aspect of an Alabama jury's factfinding,[42] that concern flowed directly and solely from the unique Alabama trial system which affirmatively denied Beck's jury any discretion with respect to the punishment to be imposed if guilt of the crime charged was found and inextricably tied a finding of guilt to a verdict of death. The trial scenario which gave rise to the Court's concerns in *Beck* is simply not presented by the guilt and sentencing process employed by the State of Nebraska.

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[41] See Preliminary Jury Instruction #10 and Jury Instruction #29, found at JA 2 and 24 respectively.

[42] *Beck*, 447 U.S. at 638.

Furthermore, if the result in *Beck* is acknowledged to be based upon the unique Eighth Amendment concerns which arise solely in the context of capital penalty determinations,[43] then the Eighth Amendment's "heightened need for reliability"[44] disappears from guilt phase determinations when, as in Nebraska, a finding of guilt for the crime of first degree murder does not even render a defendant "death eligible", much less mandate a sentence of death.[45]

We understand the result in *Beck* to be dictated solely by Eighth Amendment concerns with the unique Alabama system which inalterably tied the jury's guilt determination to a mandatory verdict of death. That fact *alone* created the risk of distortion of the jury's factfinding function found constitutionally impermissible. *Beck* does not address the more common model of guilt and penalty phase systems, such as Nebraska's, where no such mandatory guilty/death nexus exists.

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[43] "[W]e have invalidated procedural rules that tended to diminish the reliability of the sentencing determination [in capital cases]." *Beck*, 447 U.S. at 638.

[44] *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

[45] See Neb. Rev. Stat. § 29-2522(1) (Reissue 1995) which provides as the first step of a three step penalty phase analysis: "Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death." This penalty phase analysis represents the first occasion upon which consideration is given to whether the guilty defendant is "death eligible" under Nebraska law.

Therefore, the second exception of *Teague* is not applicable to this case.

CONCLUSION

The circuit court's opinion would dramatically and fundamentally alter the manner in which criminal cases are tried in this country. Neither our federal constitution, nor *Beck*, nor logic compel the result urged by the circuit court. The circuit court's opinion should be reversed and Reeves' request for habeas corpus relief denied.

Respectfully submitted,

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